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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR,
Petitioner,

v.

AMERICAN TRADING AND PRODUCTION CORP.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

Petitioner requests that a writ of certiorari issue to review the judgment of the Court of Appeals of New York entered in this case on November 27, 1979, affirming the Appellate Division's reversal of a jury verdict for petitioner.

OPINIONS BELOW

The memorandum decision by the Appellate Division of the New York Supreme Court, which is reported at 62 A.D. 2d 951, 404 N.Y.S. 2d 100, appears at Appendix A to this petition. The order of the Court of Appeals of New York affirming the decision of the Appellate Division, with one judge dissenting, which is not yet officially reported, appears at Appendix B to this petition. The Appellate Division's decision and its accompanying order, which appears at Appendix C to this petition,

reversed a judgment of the Trial Term of the New York Supreme Court, which appears at Appendix D to this petition. The Trial Term's judgment was entered on the basis of a jury verdict on special interrogatories, which appear at Appendix E to this petition.

JURISDICTION

The judgment of the Court of Appeals of New York was entered on November 27, 1979. Pet. App. 1b. Because this petition concerns a "right, privilege or immunity . . . claimed under . . . statutes of the United States," this Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

On December 16, 1966, Carl P. Blume, Master of the S.S. Washington Trader, was swept overboard in heavy seas while inspecting his vessel for damage; his body was never recovered. Petitioner, the administrator of Master Blume's estate, brought suit against respondent, the Washington Trader's owner, in New York State court to recover under the Jones Act, 46 U.S.C. § 688, and general federal maritime law for Master Blume's death. At trial, evidence was admitted showing that shortly before the accident there had been a loss of rudder control resulting in damage to the ship; that the ship's guardrail had been broken in the area of the deck where Master Blume had last been seen while inspecting the damage; and that the crew failed to initiate rescue efforts until hours after they should have realized that the Master had been swept overboard. Based on this evidence, the jury agreed in special interrogatories with petitioner's claim that the Master's death was the result of unseaworthiness and negligence for which respondent was responsible and returned a verdict for Master Blume's estate. The Appellate Division reversed, however, asserting that there

was insufficient evidence to support the verdict. The New York Court of Appeals affirmed, with one judge dissenting. Against this background, the question presented is:

> Whether, in an action based on the Jones Act and general federal maritime law, the New York appellate courts erroneously intruded on the fact-finding function of the jury, in direct contravention of previous decisions of this Court, by overturning the jury's verdict on theories of unseaworthiness and negligence where the record clearly contained evidence to support a verdict on either theory.

STATUTES INVOLVED

The Jones Act, 46 U.S.C. § 688, and the Federal Employers' Liability Acts, 45 U.S.C. §§ 51 *et seq.*, are reproduced in pertinent part at Appendix F to this petition.

STATEMENT OF THE CASE

Master Carl P. Blume was lost at sea on December 16, 1966, while inspecting his vessel, the S.S. Washington Trader, for damage caused or aggravated by heavy seas in the Pacific. To recover for his wrongful death, petitioner, the administrator of Master Blume's estate,[1] brought suit in New York State court against respondent, the Washington Trader's owner. Petitioner's complaint, which was based on both the Jones Act, 46 U.S.C. § 688, and general federal maritime law, charged that the Master's death had been caused by both respondent's negligence and the vessel's unseaworthiness.

At trial, evidence was introduced showing, among other things, (1) that the Washington Trader's rudder had failed early on the morning of December 16, causing the vessel to suffer broadside the full impact of heavy seas and to experience

[1] Master Blume died intestate, leaving a widow and minor child as his survivors.

considerable damage (Tr. 833-35, 839-41, 845);[2] (2) that Master Blume had been washed overboard later on the morning of December 16 while performing his duty of inspecting the damage to the vessel (Tr. 120-33); (3) that in the area on the poop deck where the Master had last been seen, the guardrail "was broken all along the side of the ship, all the way forward" (Tr. 126a-26b); and (4) that the crew failed to institute a search for the Master until hours after they knew or should have known of his disappearance (Tr. 122-35, 142).[3]

In light of such evidence, the trial court submitted the case to the jury on theories of negligence and unseaworthiness. Indeed, counsel for respondent acknowledged after presentation of all of the evidence that a matter such as unseaworthiness presents factual issues appropriate for resolution by the jury (Tr. 1481, 1516-17).[4]

The jury found in special interrogatories that respondent was negligent in a manner that contributed to Master Blume's death and that the vessel was unseaworthy in a manner that was the proximate cause of his death. Pet. App. 1e. The jury further found that the plaintiff's damages totalled $808,536, but that the Master's negligence had contributed to his death to the

[2] References to "Tr." are to the trial court transcript in this case. For the convenience of the Court, petitioner has caused to be certified and filed with this Court the record below, which includes the trial court transcript.

[3] There was also evidence to show that the Washington Trader's load was heavier than authorized for the winter zone of the Pacific, in which the vessel was sailing at the time the Master was lost. The trial court, however, took the issues of overloading and course-setting through the winter zone away from the jury for purposes of determining liability, since those matters were the responsibility of the Master (Tr. 1527-28)—a ruling in which the Appellate Division expressly concurred (Pet. App. 2a).

[4] For example, respondent's counsel stated at trial that "all questions of unseaworthiness are questions of fact for the jury." (Tr. 1517.)

extent of ten percent. *Id.* Accordingly, the trial court entered judgment for Master Blume's estate in the amount of $727,682.40 (ninety percent of $808,536), plus interest from the date of the Master's death.[5]

Respondent appealed the trial court's judgment to the Appellate Division of the New York Supreme Court. While appearing to recognize the applicability of federal law, the Appellate Division vacated the trial court's judgment and ordered the petitioner's complaint dismissed. Pet. App. 1c. The court expressed no disagreement with the trial court's legal rulings or with its jury instructions; rather it dismissed due to what it deemed an "insufficiency of proof" to sustain the jury's findings of negligence and unseaworthiness. Pet. App. 4a.

In particular, despite clear record evidence to the contrary, the Appellate Division purported to find "no evidence of a breakdown in the ship's steering mechanism in the early morning of December 16th" shortly before the Master was lost. Pet. App. 2a. Similarly, the appellate court claimed to find in the record "no evidence that the crew members should have known that the Master was washed overboard . . ." (Pet. App. 4a), although there was in fact testimony that certainly so indicated. And the court dismissed as "sheer speculation" any "finding that a defective storm rail on the poop deck contributed to the Master's loss. . ." because there was "no proof . . . that Master Blume went overboard in an area where the railing was defective"; the court ventured from certain testimony in the record the alternative theory that "the Master could have been knocked unconscious against a railing or bulkhead or washed directly into the sea." Pet. App. 3a. In short, the Appellate Division overturned the jury's verdict on the basis of its own reading of the record.[6]

[5] On formal motion, the trial court denied respondent's request to set aside the jury's verdict.

[6] Without explanation, the Appellate Division added in dictum that the verdict was "against the weight of the credible evidence" and that the award of damages "was excessive." Pet. App. 4a.

Petitioner appealed to the New York Court of Appeals, arguing that the Appellate Division's decision impermissibly intruded on the province of the jury in seamen's cases as established by repeated decisions of this Court.[7] The Court of Appeals entered an order affirming "for reasons stated in the memorandum at [sic] the Appellate Division." Pet. App. 1b. One judge dissented with an opinion.

The dissenting judge, stressing "that Federal and not New York law controls this case," observed that the Appellate Division's decision "proceeds on a misconception of the letter and spirit of maritime law." Pet. App. 3b, 2b. The judge recognized that "in cases like the present one," some proof of negligence or unseaworthiness, " 'however small,' " is sufficient to raise questions for the jury (Pet. App. 3b); and he demonstrated that "to find support for a prima facie case in the record [below is] a remarkably easy task" (Pet. App. 4b). As a result, he urged reversal of the Appellate Division's judgment and reinstatement of the jury's verdict, noting "the clear intention of the Federal law that jury determinations of questions of fact [in cases such as this] govern irrespective of contrary judicial views as to the weight of the evidence" (Pet. App. 5b).

REASONS FOR GRANTING THE WRIT

In seamen's cases based on the Jones Act and general federal maritime law, it has long been established that only some evidence of unseaworthiness or negligence is required for the case to go to the jury and for a jury's verdict for the seaman to be sustained. Here, there clearly was evidence of both unseaworthiness and negligence in several respects, including evidence from which the jury could have concluded that Master Blume's vessel had lost its rudder control in heavy seas resulting in considerable damage to the vessel; that the railing on the

[7] See Plaintiff-Appellant's Brief in the Court of Appeals of New York, which has been certified and filed with this Court. See p. 4 n.2, above.

poop deck where the Master had last been seen inspecting the damage was missing or broken; that the crew had failed to initiate prompt efforts to rescue the Master when they had good reason to do so; and that one or more of these factors played a part in the Master's death.

In these circumstances, the appellate courts below, as a matter of settled federal law, wholly exceeded their proper function in overturning the jury's verdict for petitioner. This Court has repeatedly made clear that appellate courts may not upset jury verdicts in Jones Act and similar cases where, as here, there is some evidence, "however small," to support the seaman's claim.[8] Thus, the leading commentators on admiralty law have observed that:

> "[I]t would be a rare court in an unusual case which would take the negligence issue away from the jury and an even rarer appellate court which would reverse a jury verdict for plaintiff as opposed to the weight of the evidence."

C. Gilmore & C. Black, *The Law of Admiralty* 377 (2d ed. 1975).

The decision below is in direct conflict with this Court's prior rulings delineating the permissible scope of appellate review of jury verdicts in seamen's cases. Moreover, the decision, if allowed to stand, may have a significant adverse impact on large numbers of seamen's right to a jury-adjudication of their claims of unseaworthiness and negligence. Certiorari is, therefore, warranted in this case. In fact, this Court has previously stressed that "[s]pecial and important reasons for the grant of certiorari in . . . [cases such as this] are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination." *Rogers* v. *Missouri P. R.R.*, 352 U.S. 500, 510 (1957).

[8] Cf. *Rogers* v. *Missouri P. R.R.*, 352 U.S. 500, 508 (1957).

I.

The Court Below Has Decided a Federal Question in Direct Conflict with Applicable Decisions of This Court.

A. Governing Federal Principles

Petitioner's complaint and the jury's finding in this case rest on two theories of liability: negligence and unseaworthiness. Pet. App. 1e. Because the right of a seaman, such as petitioner's decedent, to recover "for unseaworthiness and negligence is rooted in federal maritime law,"[9] the standard for liability on such claims is determined exclusively by federal law.

Accordingly, this Court has established that "the owner of a ship in navigable waters owes to all who are on board . . . the duty of exercising reasonable care under the circumstances of each case." *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959). Likewise, the Court's decisions "undeviatingly" hold that a shipowner has a "duty to furnish a seaworthy ship [that] is absolute and completely independent of his duty under the Jones Act to exercise reasonable care." *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960) (citations omitted).[10] So defined, the substantive standards of negligence and unseaworthiness reflect the especially " 'humane and liberal character' " of federal law in the maritime area. See generally *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 583 (1974), quoting from *The Sea Gull*, 21 Fed. Cas. 909 (No. 12,578) (C.C. Md. 1865).

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[9] *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953); accord, *e.g.*, *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 429 (1958).

[10] Accord, *e.g.*, *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 94-95 (1946); *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 100 (1944). The doctrine of seaworthiness imposes on the shipowner a duty "to furnish a vessel and appurtenances reasonably fit for their intended use." *Mitchell* v. *Trawler Racer, Inc.*, *supra*, 362 U.S. at 550. A vessel or an appurtenance is unseaworthy if it proves to be "inadequate for the purpose for which it was ordinarily used . . . . " *Mahnich* v. *Southern S.S. Co.*, *supra*, 321 U.S. at 103.

Moreover, whether a seaman's action for negligence and unseaworthiness is tried in federal court or in state court, the procedural aspects of his case are also governed by federal law. The Jones Act expressly provides for a right of trial by jury in all such cases. See 46 U.S.C. § 688.[11] And the Constitution itself has placed "under national power" control over not only the " 'substantive' " but also " 'the procedural features' " of these cases. *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953), quoting from *Panama R.R.* v. *Johnson*, 264 U.S. 375, 386 (1924).[12]

Consistently with this view, the Court has made plain that federal law determines in all courts—state and federal—the evidentiary threshold for submitting a seaman's case to the jury. See, *e.g.*, *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957); *Rogers* v. *Missouri P. R.R.*, *supra*, 352 U.S. at 509-10.[13] See also *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244 (1942). What is more, the threshold established by this Court—like the substantive standards for liability—clearly

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[11] See, *e.g.*, *Schulz* v. *Pennsylvania R.R.*, 350 U.S. 523, 524 (1956). Where, as here, a seaman joins a claim of negligence under the Jones Act with a claim of unseaworthiness under general federal maritime law, both claims are for the jury to decide—so long as the requisite evidentiary threshold is met on each claim—and a resulting jury verdict for the plaintiff must be sustained if supportable on either claim. See, *e.g.*, *Fitzgerald* v. *United States*, 374 U.S. 16 (1963); *Pope & Talbot* v. *Hawn*, *supra*, 346 U.S. at 406.

[12] See also *Kermarec* v. *Compagnie Generale Transatlantique*, *supra*, 358 U.S. at 628-29.

[13] *Rogers* involved a suit under the Federal Employers Liability Acts, 45 U.S.C. §§ 51 *et seq.*, that are incorporated into the Jones Act pursuant to its express command that "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . . " 46 U.S.C. § 688. It is well established that the principles and procedures developed under the FELA are equally applicable in suits under the Jones Act, see, *e.g.*, *Kernan* v. *American Dredging Co.*, *supra*, 355 U.S. at 439, and this clearly includes FELA evidentiary standards, see *Ferguson* v. *Moore-McCormack Lines, Inc.*, *supra*, 352 U.S. at 523.

reflects the "humane and liberal character" of federal maritime law: only " '*some evidence* of negligence' " is necessary to send a seaman's case to a jury, *Schulz* v. *Pennsylvania R.R.*, 350 U.S. 523 (1956) (emphasis added); and "[o]nly when there is *a complete absence of probative facts* to support the [jury's] conclusion" may its verdict be set aside, *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946) (emphasis added). See generally C. Gilmore & C. Black, *supra*, at 376-78.

Thus, neither the circumstantial nature of a seaman's proof[14] nor the quantity of his evidence[15] affects the threshold for submitting a seaman's case to the jury or for insulating the jury's verdict from appellate reversal. Moreover, so long as there is some evidence to support the jury's verdict, it is simply "immaterial" that the courts might draw "a contrary inference or feel that another conclusion is more reasonable." *Lavender* v. *Kurn*, *supra*, 327 U.S. at 653. Under the Jones Act, as under the FELA, "the jury, not the court, . . . is the fact-finding body" with regard to questions of negligence, *Tennant* v. *Peoria & P.U. Ry.*, 321 U.S. 29, 35 (1944); and the same is true with regard to questions of unseaworthiness when tried in suits brought under the Jones Act (see p. 9 n. 11, above).

Finally, unlike cases involving land-based torts, once some evidence of a shipowner's fault has been introduced, no further proof of proximate causation is required. For a seaman's case to go to the jury, it is necessary only that his proof justify "the conclusion that employer negligence *played any part, even the slightest,* in producing the injury or death for which damages

[14] "The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make [the] inference [that the employer's negligence played some part in the death or injury which gave rise to the suit]." *Rogers* v. *Missouri P. R.R.*, *supra*, 352 U.S. at 508; accord, *e.g.*, *Schulz* v. *Pennsylvania R.R.*, *supra*, 350 U.S. at 526.

[15] See, *e.g.*, *Lavender* v. *Kurn*, *supra*, 327 U.S. at 652-53.

are sought." *Rogers* v. *Missouri P. R.R.*, 352 U.S. at 506 (emphasis added).[16] Indeed, to avoid a jury verdict once such proof has been admitted, the employer must—as the leading commentators on admiralty law have recognized—"establish by indisputable and uncontroverted evidence both the cause of the accident and [his] own freedom from negligence." C. Gilmore & C. Black, *supra*, at 378.

The decision below was rendered in complete disregard of these settled federal principles that have long governed the adjudication of seamen's cases such as the present one.

B. The Evidence in this Case

At trial, petitioner submitted probative evidence that Master Blume's death resulted, at least in part, from both unseaworthiness and negligence for which respondent, as owner of the Washington Trader, was responsible. Consequently, as the dissenting Judge below noted, it is "remarkably easy" to find "support for a prima facie case in the record" here. Pet. App. 4b. The appellate courts below chose, however, to ignore much of petitioner's evidence and to draw from the record their own inferences contrary to those of the jury. By so doing, those courts invaded the province of the jury, deprived petitioner of his established federal right to trial by jury, and acted in direct disregard of this Court's repeated holdings concerning the deference to be accorded jury verdicts in seamen's cases.

To demonstrate the appellate courts' serious and unwarranted interference with petitioner's jury trial right, it is sufficient to consider here just three examples of record evidence, each of which *independently provides* an adequate basis for the jury's verdict in this case under established federal standards:

[16] Accord, *e.g.*, *Schulz* v. *Pennsylvania R.R.*, *supra*, 350 U.S. at 526; *Gallick* v. *The Baltimore & O. R.R.*, 372 U.S. 108, 113-17 (1963).

First, the Appellate Division's decision, which constituted the sole basis for the Court of Appeal's order (Pet. App. 1b), was expressly premised on the assertion that "[t]here simply is no evidence of a breakdown in the ship's steering mechanism in the early morning of December 16" (Pet. App. 2a), the morning on which Master Blume was lost. However, the Washington Trader's Chief Mate, Mr. Perkins, respondent's own witness, expressly acknowledged at trial that the vessel had "lost rudder" on "the morning of the 16th." (Tr. 833-34.)[17]

There is no question that such a loss of rudder control constitutes an unseaworthy condition for which respondent is absolutely responsible (see p. 8, above).[18] Further, there is record evidence indicating that the loss of rudder control early on December 16 caused the Washington Trader to "broach[] to" and to suffer considerable damage in heavy seas (Tr. 840-41, 845, 701-07), and that Master Blume was lost while performing his duty to inspect such damage (Tr. 120-33).

[17] The Chief Mate also testified that he was awakened "about three o'clock in the morning on the 16th of December," called to the vessel's bridge, and there met Master Blume who told him "that the ship had lost its rudder and lost her steerage and . . . had sustained some damage on deck . . . . " (Tr. 839-40; see also Tr. 1376-77.)

There was also evidence that the Washington Trader lost rudder control on December 13 (Pltfs' Exh. 7); but, as the preceding testimony shows, the record certainly is *not* "clear"—as the Appellate Division claims (Pet. App. 2a)—"that there was a loss of rudder control on *only*" December 13 (emphasis added). Indeed, the Appellate Division's assertion is based entirely on its unquestioning acceptance of the ship's log of December 12-13, yet there was evidence before the jury casting considerable doubt on the reliability of the log, including evidence as to lapses or delays in maintaining logs of this kind (Tr. 1387-90) and evidence of alteration and omissions from the Washington Trader's log (Tr. 1363-72, 1383-94).

[18] In fact, the trial court specifically instructed the jury that the loss of rudder control constitutes an unseaworthy condition (Tr. 1566), and neither of the New York appellate courts expressed any disagreement with this instruction.

Thus, despite what the Appellate Division asserts, there were "probative facts" in the record from which the jury could have found that Master Blume's death was, at least in part, the result of the unseaworthy condition of the S.S. Washington Trader's steering mechanism.[19] Cf. *Lavender* v. *Kurn, supra,* 327 U.S. at 653; *Gallick* v. *The Baltimore & O. R.R.,* 372 U.S. 108, 113-17 (1963).

Second, Seaman Kuberski, a member of the Washington Trader's crew on the fatal voyage, testified at trial that the poop deck railing "was broken all along the side of the ship, all the way forward," in the location where Master Blume had last been seen inspecting the vessel for damage. (Tr. 126a-126b.)[20] The courts below did not question, as they could not (see p. 8, above), that such a broken guardrail constituted an unseaworthy condition for which respondent was responsible. However, because the evidence did not establish precisely where Master Blume went overboard, the Appellate Division decided that "any finding that a defective storm railing on the poop deck contributed to the Master's loss is sheer speculation." Pet. App. 3a.

But this Court has made clear that in cases of this type "[i]t is no answer to say that the jury's verdict involved speculation . . . . " *Lavender* v. *Kurn, supra,* 327 U.S. at 653. Seaman Kuberski testified that he saw Master Blume enter an outer passageway on the port side of the ship in the area where the railing "was broken all along the side of the ship"; that he then saw heavy seas wash down that passageway; and that he never saw the Master again. (Tr. 121-126b.) From such evidence, the jury, as trier of fact, was certainly entitled to infer

[19] The trial court, without objection by respondent's counsel, properly instructed the jury on the need for "a direct causal relationship between the defect complained of and the ultimate loss." (Tr. 1567).

[20] There was additional testimony based on a damage report corroborating Kuberski's testimony concerning damage to the railing on the poop deck. (Tr. 425-26.)

that the Master had been washed overboard at a place where the railing was broken, although neither Kuberski nor anyone else may actually have seen this occur.[21] In short, there clearly was " 'some evidence' " on which the jury could have found that the broken railing played a part in Master Blume's death. Cf. *Schulz* v. *Pennsylvania R.R., supra,* 350 U.S. at 523; *Rogers v. Missouri P. R.R., supra,* 352 U.S. at 506-07.[22]

Third, in response to petitioner's argument at trial that respondent's crew negligently delayed attempts to rescue Master Blume until several hours after he had disappeared in heavy seas, the Appellate Division baldly asserted that "[t]here is no evidence that the crew members should have known that the Master was washed overboard." Pet. App. 4a. But Seaman

[21] This is especially true since Kuberski also acknowledged that "[o]ther than this railing ... described as being bent and broken" there was not "anything ... to prevent anything or anybody from going over the side" in the area where the Master disappeared (Tr. 127) and that there was "[o]nly one place he [the Master] could have went," namely, "[o]ver the side" (Tr. 133).

[22] There was also evidence from which the jury could have found that respondent, through its employee Chief Mate Perkins, was negligent in failing to replace or repair the broken railing on the poop deck prior to the Master's loss. Perkins, who was in charge of the deck department (Tr. 761-62), testified that he was summoned to the bridge early on the morning of December 16, and that Master Blume told him that "the ship had lost its rudder ...," that "they had sustained some damage on deck," and that he was "to check it" (Tr. 840). Perkins proceeded to the aft part of the vessel where he shined a flashlight on the deck damage, but could not see it completely in the dark; he returned to the bridge to report to the Master and then went back to sleep. (Tr. 840, 727.) As to railings that he found upon his inspection to be damaged or missing, he claimed that it was "impossible" to get to them in order to string rope life-lines, although he and his men had done so on other occasions. (Tr. 882-83). From such evidence, the jury was entitled to infer negligence on the part of the crew and that such negligence ultimately played a part in the Master's death (see pp. 10-11, above). Cf., *e.g., Tennant* v. *Peoria & P. U. Ry., supra,* 321 U.S. at 33-36.

Kuberski's testimony plainly allows—if not compels—that inference. After testifying that heavy seas struck the area on the poop deck where the Master was last seen inspecting for damage (Tr. 122-24), Kuberski went on to state:

> "We looked out to see if anything happened and we didn't see him, *so I took it for granted that he got out of the way* .... And I didn't realize until later on, then we started thinking about it. And then finally it dawned on us that might have happened to him. Because I know the water hit him and it hit real hard." (Tr. 134 (emphasis added)).

Moreover, it was not until over an hour, if not more, after the events on the poop deck that Kuberski reported to Chief Mate Perkins what he had seen—and not seen—occur (Tr. 127-35);[23] and the Chief Mate did not initiate efforts to rescue Master Blume until at least another three hours after receiving Kuberski's report (Tr. 142). "Fair-minded men could certainly find from the foregoing facts" that respondent, through its employees, was guilty of negligence that contributed to the loss of Master Blume;[24] indeed, the jury apparently did so (Pet. App. 1e). In all events, given the record evidence concerning the crew's conduct on the morning when the Master dis-

[23] Kuberski testified that, after the heavy seas had struck the area where Master Blume was last known to have been, he and the other crewman with him "looked for several minutes and then—then we didn't. Then we sat down and I finish [*sic*] my coffee." (Tr. 126.) Kuberski never saw the Master again after this time. (Tr. 126-126a.)

[24] *Schulz* v. *Pennsylvania R.R., supra,* 350 U.S. at 526. This is not to say Kuberski willfully ignored the Master's plight. However, it is generally understood that "negligence consists of doing that which a person of reasonable prudence would not have done or of failing to do that which a person of reasonable prudence would have done under like circumstances." *Id.* at 525. These are questions " 'for the jury to determine,' " *id.* (citation omitted), and in this case the jury certainly could have found from the evidence that Kuberski—and others—"fail[ed] to do that which a person of reasonable prudence would have done under like circumstances."

appeared, there obviously was not the "complete absence of probative facts" that must exist before the jury's verdict may be overturned. *Lavender* v. *Kurn, supra,* 327 U.S. at 653.

There is, to be sure, other evidence in the record concerning the loss of steerage, the condition of the guardrails, and even the adequacy of the crew's response to Master Blume's disappearance. But that is not the issue here. It was the jury's function to decide what evidence to believe and not to believe, see *Lavender* v. *Kurn, supra,* 327 U.S. at 653; and it was the jury's function "to select from among conflicting inferences and conclusions that which it consider[ed] most reasonable," *Tennant* v. *Peoria & P. U. Ry., supra,* 321 U.S. at 35.

The jury having performed these functions on the basis of ample record evidence, neither the respondent nor the reviewing courts were "free to relitigate the factual dispute[s]" involved in this case. *Lavender* v. *Kurn, supra,* 327 U.S. at 652. Despite this fact, the courts below clearly chose to impose on this case their own view of the record and thus reversed the jury's unanimous verdict for petitioner on both unseaworthiness and negligence.[25] By so doing, those courts invaded "the

[25] In reversing the jury's verdict, the Appellate Division observed that, at the time Master Blume was lost, the Washington Trader "was 'pooping the seas,' . . . a nautical term for bow-to-stern movement with the vessel scooping up and taking seas over the stern." Pet. App. 3a. The court claimed that expert testimony had shown this to be a "dangerous" situation for which the Master was responsible and implied that respondent is therefore relieved of all liability for the Master's loss. Pet. App. 3a, 4a. While these remarks illustrate just how far the Appellate Division went in retrying the case to suit its own views rather than deferring to those of the jury, the essential point is that the Master's conduct was relevant only to assessing contributory negligence, an issue on which the jury was fully and correctly charged (Tr. 1587-89) and on which the jury in fact returned a verdict of ten percent fault on the part of Master Blume (Pet. App. 1e). This Court's decisions make clear that the Master's own fault, if any,

(*footnote continues*)

historic function" of the jury in direct conflict with numerous decisions of this Court,[26] and certiorari is, therefore, necessary to vindicate the right to jury trial in cases such as this. Cf. *Rogers* v. *Missouri P. R.R., supra,* 352 U.S. at 510.

II.

The Decision Below Should Be Summarily Reversed.

This Court has repeatedly emphasized that appellate courts may not overturn jury verdicts in seamen's and similar cases so long as there is " 'some evidence' " of negligence or unseaworthiness. See pp. 10, above; C. Gilmore & C. Black, *supra,* at 376-78. Nonetheless, the Appellate Division did so in this case, and the Court of Appeals sustained its decision.

Where lower courts have thus failed to respect the evidentiary threshold established by this Court for Jones Act and similar cases, this Court has regularly granted certiorari, summarily reversed the appellate court decision, and directed that the jury's verdict be reinstated. *E.g., Stinson* v. *Atlantic Coast Line Railroad Co.,* 355 U.S. 62 (1957); *Butler* v. *Whiteman,* 356 U.S. 271 (1958). See also *Palermo* v. *Luckenbach S.S. Co.,* 355 U.S. 20 (1957). See generally *Harris* v. *Pennsylvania R.R.,* 361 U.S. 15, 19-21 (1958) (appendix to

(*footnote continued*)

provides no basis for taking the case from the jury and denying recovery altogether. See, *e.g., Kermarec* v. *Compagnie Generale Transatlantique, supra,* 358 U.S. at 629; *Pope & Talbot, Inc.* v. *Hawn, supra,* 346 U.S. at 408-09. This same point disposes of the Appellate Division's suggestion that recovery should be denied because overloading of the Washington Trader, for which the Master was responsible, may also have contributed to his loss. Pet. App. 3a.

[26] See, *e.g., Lavender* v. *Kurn, supra,* 327 U.S. at 652-53; *Schulz* v. *Pennsylvania R.R., supra.* As this Court observed in *Tennant* v. *Peoria & P. U. Ry., supra,* 321 U.S. at 35: "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

concurring opinion of Douglas, J., citing and categorizing cases). In light of the record here, petitioner submits that this is the most appropriate disposition of the present case.[27] Indeed, such a disposition is especially appropriate because the New York State courts are one of our Nation's principal maritime jurisdictions; and thus the decision below, if allowed to stand, could seriously impact large numbers of cases in which seamen seek to exercise their federally guaranteed right to a jury-adjudication of their negligence and unseaworthiness claims.

CONCLUSION

For the reasons stated, certiorari should be granted, the decision below summarily reversed, and the case remanded with instructions to reinstate the jury's verdict. Alternatively, certiorari should be granted and the case set for plenary review.

Respectfully submitted,

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February 1980

[27] Due to the clear conflict between the appellate decisions below and this Court's holdings, this Court should, at the least, grant certiorari and set the case for plenary review.

APPENDIX A

APPENDIX A

MEMORANDUM DECISION

APPELLATE DIVISION, SUPREME COURT
FIRST DEPARTMENT

April 20, 1978

Murphy, P.J., Birns, Silverman, Evans, Sullivan, JJ.

1962 Thomas I. Fitzgerald, etc., as Administrator of the Estate of Carl P. Blume, deceased,

Plaintiff-Respondent K. Heller

—against—

American Trading and Production Corp.,

Defendant-Appellant J.M. Costello

Judgment, Supreme Court, New York County (Greenfield, J.), entered May 17, 1977 in the sum of $1,227,520.12, unanimously reversed, on the law, vacated and the complaint dismissed, without costs and without disbursements.

The verdict in plaintiff's favor for the wrongful death of Carl P. Blume, Master of the S.S. Washington Trader, a converted tanker owned by defendant, was based on both unseaworthiness and negligence.

On December 16, 1966, Master Blume perished in the North Pacific. He was last seen in circumstances suggesting, as plaintiff contends, that he was swept overboard by heavy seas as he was making a tour of inspection at first light. It is conceded that the vessel had been loaded to the maximum permitted for a voyage in the Summer Zone but that it overloaded for the Winter Zone. A vessel in the Winter Zone will encounter heavier seas. Hence, the vessel requires more reserve buoyancy for safety. This reserve buoyancy factor is determined by the depth of the hull in the water. The lower the hull is submerged the less free board or buoyancy. The depth

of the hull can be gauged by looking at the vessel's Plimsoll marks. The evidence discloses that the shipowner designated the port of departure and destination as well as a port for taking on additional bunkers. The loading of the vessel, the amount of fuel to be taken aboard, the amount of stores as well as the setting of a course for the vessel are the exclusive responsibility of the Master. Master Blume set a course which he selected from three available routes. In point of fact, there was an insufficient supply of fuel for one of the routes, and the other posed greater hazards in the winter months than the one chosen. When the vessel, loaded with grain, left Portland, Oregon, bound for India, the Certificate of Loading issued by the Coast Guard showed compliance with the international load line regulations for the Summer Zone. The course set by Master Blume, however, took the vessel into the Winter Zone. This was a violation of law. (46 U.S.C. §85 et seq.) From the time of her departure on December 3rd until the morning of December 16th, the Trader encountered heavy seas and bad weather. As early as December 5-7, the Trader was "rolling hearily (sic) in deep . . . swells!" On December 8-9, her log showed "mountainous seas on deck, heavy swell." Overloading a vessel is, of course, a statutory fault and an overloaded vessel is unseaworthy. (See *The Indien,* 71 F. 2d 752 [9th Circuit]; *The Benjamin Noble,* 244 F. 95 [6th Circuit]). However, the trial court quite properly took the issue of overloading as well as the setting of the course through the Winter Zone away from the jury because both were solely the responsibility of the Master (Cf. *Walker* v. *Lykes Bros. Steamship Co., Inc.,* 193 F. 2d 772.) By taking his overloaded vessel into the Winter Zone Master Blume consciously violated a duty of his employment as Master. (Cf. *The Giles Loring,* 48 F. 463.) Once these issues were removed from the jury's consideration we fail to find evidence of either unseaworthiness or negligence in this record sufficient to sustain the verdict. There simply is no evidence of a breakdown in the ship's steering mechanism in the early morning of December 16th, as plaintiff contends. The record is clear that there was a loss of rudder control on only occasion, at

0215 hours on the morning of December 13th, a few days earlier. That loss of steering was attributed to an open oil by-pass valve in the steering engine and it is undisputed that control was restored 13 minutes later. Absence of proof of the rudder failure on December 16th eliminates two basic contentions of plaintiff, namely, that the inability to steer and maintain headway constituted an unseaworthy condition which resulted in damage to the vessel from the heavy seas, and that the Master was swept overboard while performing his duty to inspect to determine the extent of that damage. Even if it were shown that the vessel sustained damage on the thirteenth from the heavy seas no causal connection was shown between that incident and the loss of the Master a few days later. As for the specification of unseaworthiness based on a broken or bent storm railing on the poop deck, there simply is no proof that any defective railing was a proximate cause of the Master's loss. There is no proof even that Master Blume went overboard in an area where the railing was defective. In fact, plaintiff's expert testified that the Master could have been knocked unconscious against a railing or bulkhead or washed directly into the sea. Therefore, any finding that a defective storm railing on the poop deck contributed to the Master's loss is sheer speculation.

It is evident from testimony in the record that an overloaded vessel encountering heavy seas in the Winter Zone would tend to ship waves across its decks. The combined weight of the cargo itself and the waves washing over the decks would submerge the vessel deeper into the water. Thus, the presence of any sea water in the forward parts of the Trader after the Master was lost was caused by the overloading of the vessel. There is no evidence that the water entered that area for any other reason.

The record further discloses that at the time the Master went overboard the Trader was "pooping the seas", which is a nautical term for bow-to-stern movement with the vessel scooping up and taking seas over the stern. Plaintiff's expert testified

that taking seas over the stern is dangerous in heavy seas. This is, of course, a navigational act attributable to the Master.

As for the claims of negligence we find neither fault nor proximate cause even if fault exists. There is no evidence that the crew members should have known that the Master was washed overboard or that they failed to institute proper procedures to determine if he was lost. Nor is there a basis in the record from which to conclude that the chief mate should have accompanied the Master on his fateful inspection tour. Finally, we note that were we not dismissing for insufficiency of proof, we would, in any event, set aside the verdict as against the weight of the credible evidence and because the award of damages was excessive.

Order filed.

APPENDIX B

APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

No. 448

Thomas I. Fitzgerald, &c.,
as Administrator of the
Estate of Carl P. Blume,
Deceased,

Appellant,

vs.

American Trading and Production Corp.,
Respondent.

Dissenting Opinion

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(448) Robert Markewich & Kenneth Heller, NY City, for appellant.

Joseph M. Costello & Frederick N. Gaffney, NY City, for respondent.

* * *

Order affirmed, with costs, for reasons stated in the memorandum at the Appellate Division (62 A D 2d 951). All concur except Fuchsberg, J., who dissents and votes to reverse in an opinion.

Decided November 27, 1979

Fitzgerald v. American Trading and Production Company

Case No: 448

FUCHSBERG, J. (dissenting):

As best I can fathom it from the record, the opinion and order of the Appellate Division dismissing the complaint proceeds on a misconception of the letter and spirit of maritime law.

To initiates in the law of the sea this is not a complex case. The plaintiff's decedent, Carl P. Blume, Master of a tanker owned by defendant was swept overboard in rough weather during a voyage across the Pacific from the United States to India. This action for wrongful death brought on theories of unseaworthiness and negligence, was anchored in the main on allegations that (1) on the day Blume lost his life the ship was wallowing helplessly in extremely turbulent seas, having lost rudder control because of a defective valve; (2) that the Master had set out on a tour of inspection of the extensive consequent damage to the vessel; (3) that, while so engaged, he disappeared from sight in heavy seas at a point where unrepaired protective railings had been washed away or damaged; and (4) that the ship did not reverse course to search for the Master until five hours and forty minutes later.[1]

After an extensive jury trial, Justice Greenfield, in an impeccable charge, submitted issues of alleged unseaworthiness and negligence, along with those of proximate cause, contributory negligence and damages, to the jury. The jury returned a verdict of $808,536, reduced by its finding that contributory negligence accounted for ten per cent of the loss, to $727,682.40. Although the trial judge denied all motions to disturb the verdict, the Appellate Division reversed the judgment entered thereon and, as indicated, dismissed the complaint. I believe the law and the facts leave us no option but to reinstate the judgment.

---

[1] Issues as to overloading and course-setting had also been pressed but were withdrawn from the jury's consideration by the court before the case went to the jury on the ground that these would have been the exclusive responsibility of the Master of the vessel himself.

At the outset, I stress that Federal and not New York law controls this case. Though the Federal Judiciary Act grants concurrent jurisdiction to the Federal and State courts (US Code, tit. 28, § 1333), all must apply the Federal law in order to secure a single uniform body of admiralty law (see *Matter of Rederi* [*Dow Chemical Co*], 25 NY2d 576, 581 [Fuld, Ch.J.]).

Supplanting the ordinary common law duty of master and servant, maritime law is imbued with an overtly "humanitarian policy" responsive to the hazards faced by those who go to sea and, accordingly, has seen fit to implement that policy by shifting the burden of the cost of injury to those thought best able to bear it. Thus, the law has imposed a liability for risks which the owner of a vessel can prevent, whether by providing a seaworthy vessel or avoiding negligence, that for all practical purposes is absolute. (*Seas Shipping Co.* v. *Sieracki*, 328 US 85, 93-94; *Milin* v. *United States Lines, Inc.*, 31 NY2d 336, 338.) And as to negligence, Federal statutory law, has for like reasons made inapplicable the traditional tort doctrines of assumption of risk and contributory negligence (US Code, tit. 45 [Federal Employers' Liability Act] as incorporated by US Code, tit. 46, § 688 [Jones Act]; see *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 US 521).

Furthermore, consistent with the protective nature of this substantive law, the level of proof necessary to establish a prima facie case of either unseaworthiness or negligence is reduced to a point where it can fairly be said that no more than a scintilla of evidence is necessary. So, in contrast to the heavier burden usually assessed by the common law, in cases like the present one it has been authoritatively stated that it suffices if there is proof that negligence or unseaworthiness played any part "however small" in causing an injury or death (*Rodgers* v. *Missouri Pac RR*, 352 US 500, 506-510). Among other characterizations recognized as accurate descriptions of the requisite showing are "featherweight" (*Landry* v. *Two R. Drilling Co.*, 511 F.2d 138, 142) and "slight" (Gilmore & Black, Admiralty, § 6-30, p 311).

So measured, to find support for a prima facie case in the record was a remarkably easy task.

Turning first to the loss of steering, the damage it caused and the fatal danger-ridden inspection thus precipitated, the defendant disputed whether the loss of rudder control occurred on December 16th, when the fatality occurred, or three days earlier, on December 13th, as the ship's log entry indicated. But the entry hardly had to be determinative since there was proof of various irregularities in the log; these included the fact that entries were not always made contemporaneously, thus opening up the real possibility that an entry date made later, especially under the stress of a very trying voyage, would be inaccurate. Moreover, because of the interposition of the international date line and the accompanying change of time zones, the difference between the two dates may have actually represented something less than two days. And, perhaps most important, even if the loss of steering and resulting damage indeed had occurred on the 13th, the result would only have enlarged the period during which evidence of unseaworthiness—including both the condition of the guardrails and the other damage—had existed to the 16th.

Next, with respect to the circumstances of Master Blume's demise, according to the testimony of the witness Kuberaski, who last saw the Master before he disappeared from sight as "green water" hit the ship, there was nowhere Master Blume could then have gone except overboard at that point. Notably, the damaged and missing rails, whose repair was the charge of Chief Officer Perkins, were the only things that could have prevented his being swept away. In fact, at one point defendant's counsel agreed that whether the guardrails were unseaworthy and, if so, proximately causative of the death, was a question of fact for the jury.

With regard to the actual drowning and the failure to fulfill the obligation to search, I need only note that the record raised issues of fact as to whether the conduct of the ship's personnel

comported with their duty under the circumstances (see *Abbott* v. *US Lines Co.*, 512 F2d 118, 121).

From all this evidence, the jury was certainly not compelled to draw the inferences which the Appellate Division ultimately did. Rather, as the trial judge correctly recognized, it was for the triers of the facts, not a reviewing court, to select from among the available inferences and conclusions those which it considered most reasonable (see *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 US 29, 35). For the same reasons, though the trial judge came to the conclusion that loading and course-setting were primarily duties owed by the Master to the vessel's owner as his sole responsibility and therefore would not permit them to serve as an affirmative premise for recovery, it was for the jury alone to determine, as it did, what role these factors played on the issue of proximate cause or as a contributing factor in diminution of a recovery for negligence.

Finally, a word as to why I not only would reverse but would reinstate the judgment as well. Ordinarily, the Appellate Division's reversal having been on the law, a remittal to it for review of the facts would be in order (CPLR § 5501, subd c). However, I believe that our rule of practice must bow to the dictates of the Jones Act and Federal maritime law. For a "maritime tort is placed by the United States Constitution under the national power to control 'its substance *as well as its procedural features*' " (*Pope & Talbot, Inc.* v. *Hawn*, 346 US 408, 409 [Black, J.], quoting *Panama R. Co.* v. *Johnson*, 264 US 375) (emphasis mine). A contrary view would affect the result of the litigation, "i.e., would be outcome determinative" (*Matter of Rederi* [*Dow Chemical Co.*], *supra*, 581). It would subvert the clear intention of the Federal law that jury determinations of questions of fact govern irrespective of contrary judicial views as to the weight of the evidence. Accordingly, neither our State Constitution nor our procedural statutes are an impediment to the enforcement of the philosophy written into maritime law (US Const., art 6, clause 2).

APPENDIX C

APPENDIX C

ORDER OF APPELLATE DIVISION,
FIRST DEPARTMENT, APRIL 20, 1978

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 20, 1978

Present—Hon. FRANCIS T. MURPHY, JR., Presiding Justice
HAROLD BIRNS
SAMUEL J. SILVERMAN
HERBERT B. EVANS
JOSEPH P. SULLIVAN
Justices

1962

Thomas I. Fitzgerald, Public Administrator
of the County of New York, as Administrator of
the Estate of Carl P. Blume, deceased,
Plaintiff-Respondent,

-against-

American Trading and Production Corp.,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from a judgment of the Supreme Court, New York County (Greenfield, J.) entered on May 17, 1977 in favor of the plaintiff against the defendant in the total amount of $1,227,520.12 and said appeal having been argued by Mr. Joseph M. Costello of counsel for the appellant, and by Mr. Kenneth Heller of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby reversed, on the law, without costs and without disbursements, vacated and the complaint dismissed. The Clerk is directed to enter judgment in favor of the defendant-appellant dismissing the complaint.

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK.

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the Estate of Carl. P. Blume, deceased,

Plaintiff,

against

AMERICAN TRADING AND PRODUCTION CORP.,

Defendant.

Index No. 19530/67

The above entitled action having duly come in for trial before Honorable Judge Edward J. Greenfield, and a jury at a Trial Term, Part 22 of the Supreme Court, held in and for the County of New York, at the Courthouse, 60 Centre Street, in the City of New York, on April 25, 26, 27, 28, 29 and May 2, 3, 4, 5, 6 and 9, and the plaintiff having appeared by Kenneth Heller, Esq., attorney for the plaintiff and the defendant having appeared by D'Amato, Costello and Shea, attorneys for defendant, and the issues having been duly tried; and the jury having rendered a special and general verdict in favor of the plaintiff against the defendant American Trading and Production Corp., on May 9, 1977, in the amount of $808,536.00, and the jury having found 10% contributory negligence on the part of the plaintiff, and the Court having fixed the sum of 90% of $808,536.00 at $727,682.40, with interest to run from December 16, 1966, and the Court having denied the motions by defendant to set the verdict aside, and the costs and disbursements of the plaintiff having been taxed in the sum of $582.10,

Now, on motion of Kenneth Heller, attorney for the plaintiff, it is

Adjudged, that the plaintiff, Thomas I. Fitzgerald, Public Administrator of the County of New York, as Administrator of the Estate of Carl P. Blume, Deceased, have judgment against the defendant, American Trading and Production Corp., on the issues as tried, and it is further

Adjudged, that the plaintiff, Thomas I. Fitzergald, Public Administrator of the County of New York, as Administrator of the Estate of Car! P. Blume, Deceased, of 31 Chambers St., N. Y. C., recover of the defendant American Trading and Production Corp., residing at 555 Fifth Avenue, New York, New York, the sum of $727,682.40, together with the sum of $499,255.62, representing interest thereon from the 16th day of December 1966, together with the sum of $582.10/100 costs and disbursements as taxed, making the total sum of $1,227,520.12/100, and that the plaintiff have execution therefor.

Judgment signed and entered this 17th day of May, 1977.

NORMAN GOODMAN

Clerk

Filed
May 17 1977
New York
Co. Clerk's Office

APPENDIX E

APPENDIX E

QUESTIONS

1. Was defendant, its agent or employees negligent in a manner that played any part, even the slightest, in causing Captain Blume's death?

Yes ✓ No ____

2. Was the vessel S.S. WASHINGTON TRADER unseaworthy in a manner that was a proximate cause of Captain Blume's death?

Yes ✓ No ____

If your answer to both questions 1 and 2 was "no", do not answer the remaining questions. If your answer to either Question 1 or 2 both was "yes", answer the remaining questions.

3. Was plaintiff negligent in a manner that contributed to causing his death?

Yes ✓ No ____

4. If your answer was "yes" to Question 3, then to what extent if any, did his negligence contribute to causing his own death? Express your answer in terms of a percentage

10%

5. Fill in the amounts that will adequately and fairly compensate plaintiff for his damages, without any reduction for negligence, if any on Captain Blume's part.

$808,536.00

Wages-past & future	$808,536.00
Consortium	0
Care & nurture	0
	$808,536.00

APPENDIX F

APPENDIX F

The Jones Act, Title 46 U.S.C. §688, provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The Federal Employers' Liability Act (Title 45 U.S.C.) states in pertinent part:

> §51. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependant upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or

by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§53. In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§54. In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§56. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

79-1299

No. 79-

Supreme Court, U. S.
FILED
APR 30 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS I. FITZGERALD,
PUBLIC ADMINISTRATOR,

Petitioner,

v.

AMERICAN TRADING AND PRODUCTION CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS I. FITZGERALD,
PUBLIC ADMINISTRATOR,
Petitioner,

v.

AMERICAN TRADING AND PRODUCTION CORP.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

Respondent requests this Court decline to grant Certiorari to review a decree of the Court of Appeals of the State of New York of November 27, 1979, which decree affirmed the Order of the Appellate Division.

Opinions Below

The opinions below are as set forth in Petitioner's brief (hereinafter P.Br.). The judgment entered on the Order of the Appellate Division, First Judicial Department, appears in Appendix A to this brief. The judgment entered on the decree and remittitur of the Court of Appeals of New York appears at Appendix B to this brief.

Jurisdiction

This Respondent does not differ with the jurisdictional claim of Petitioner.

Question Presented

Should this Court grant the Writ requested by Petitioner when two Appellate Courts of the State of New York, applying the governing Federal Maritime Law, have found the proof of the Petitioner insufficient to sustain a verdict when viewed in connection with the acts of the decedent, and when Petitioner's own uncontradicted proof in the Trial Court demonstrated that irrespective of any of the foregoing, that the decedent could not have survived the force of the seas, so as to render any acts allegedly independent of the Master's own conduct, not proximately related to his demise as a matter of law.

Statutes Involved

46 U.S.C. § 688, The Jones Act, *see* P.Br. Appendix F.

45 U.S.C. §§ 51 *et seq.*, The Federal Employers' Liability Act, *see* P.Br. Appendix F.

Former 46 U.S.C. §§ 85 *et seq.*, The Loadline Law, is reproduced in pertinent part in Appendix C to this brief.

46 U.S.C. §§ 761 *et seq.*, The Death on the High Seas Act, is reproduced in pertinent part in Appendix C to this brief.

McKinney, The Estates, Powers & Trusts Law (1967), Sec. 5-4.3.

Statement of the Case

The action dismissed by the Appellate Division, was instituted by Petitioner pursuant to three Federal statutes: The Jones Act, *supra* 2; The Death on the High Seas Act, *supra* 2; and the Loadline Law, *supra* 2. Petitioner also asserted a cause of action pursuant to *Moragne* v. *State Marine Lines, Inc.*, 398 U.S. 375 (1970).

As noted, suit was instituted by Petitioner pursuant to the Loadline Law. The Amended Complaint of Petitioner paragraph 24, sets forth the following (Tr.[1] A9):

> "That suit herein is brought under but not limited to Title 46 Section 85-85(g), a safety statute of the United States, which because of *defendant shipowner's violation of its various sections* as aforementioned, creates a presumption of negligence on the part of the shipowner." (emphasis added)

Notwithstanding the foregoing (and Petitioner's recital in his brief[2] before the New York Court of Appeals, hereinafter P.Br. NYCA, at pages 21-22 and 76), Petitioner nonetheless relegates the veritable core of this case in the prior Appellate Courts to a footnote before this Court (P.Br. 4, fn. 3).

Simply put,[3] it was the position of the Petitioner before the Trial Court, that a vessel loaded to its summer

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[1] References to "Tr." indicate pages in the record of the proceedings in the Court below, filed with this Court by Petitioner.

[2] The briefs of both Plaintiff-Appellant and Defendant-Respondent before the New York Court of Appeals have been filed with this Court by Petitioner.

[3] The statement of facts before the New York Court of Appeals constituted a lengthy presentation. Accordingly, this Court is respectfully referred, should it be appropriate, to the "Statement of the Case" as set forth in the brief of this Respondent before the New York Court of Appeals at pp. 9-43 (hereinafter R.Br. NYCA).

marks, entered the winter zone of the North Pacific, under the command of the decedent. That this overloaded vessel[4] encountered heavy seas, and that by virtue of its overload, it was caused to sustain severe damage. It was further contended by the Petitioner that the overloading of the vessel, which was attributed to Respondent[5], constituted a violation of law (Tr. A436-37). It was Petitioner's further contention that Master Blume, while inspecting the severe damage as induced by the overloaded condition of the vessel, was caused to perish.

Inasmuch as the Petitioner is in agreement with the Trial Court's excision from the case of the issues of the responsibility for the loading and course-setting, as he set forth that position before the New York Court of Appeals (P.Br. NYCA 27), then it is established for all purposes, that the presence of the overloaded vessel in the winter zone was the sole responsibility of Master Blume. Since it was Petitioner's further contention before the Trial Court, that had the vessel not been overloaded at the time of the temporary loss of rudder control, the vessel would not have sustained *severe* damage, mandates the conclusion that it was the decedent himself who had responsibility for that which caused this damage and which resulted in the loss of his life.

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[4] This caused the vessel (apart from the effect of the seas upon its decks pushing the vessel deeper) to be at least, seven or eight inches deeper in the water than it should have been (Tr. A338).

[5] The Court's attention is respectfully directed to that portion of the record, wherein it was Petitioner's contention before the Trial Court that it was not the Master who had responsibility for the loading and the course-setting, but that rather, the Master was in a "mental strait-jacket" (Tr. A590; 592-94), as limited by his amount of fuel (Tr. A586-88; 1433-35; 1477), and by prior operational norms (Tr. A590-91; 1549).

After eleven days of trial, the cause was submitted to the jury. The jury's verdict was the only result it could have reached, based upon the charge of the Trial Court which removed from its consideration for any and all purposes (Tr. A1581-82), the loading of the S.S. WASHINGTON TRADER, the course set by the decedent, and its entry into the winter zone overloaded (Tr. A1554-55). To the jury's verdict was added prejudgment interest by the Trial Court, in the amount of $499,255.62.

Accordingly, the matter before this Court involves more than just a recitation of isolated occurrences seemingly unrelated to the aforementioned activities of the decedent.

Notwithstanding that the Appellate Division reversed the judgment and dismissed the Complaint on grounds wholly apart from the sufficiency or appropriateness of the charge to the jury, Petitioner sets forth that the Appellate Division (P.Br. 5):

> ". . . expressed no disagreement with the trial court's legal rulings or with its jury instructions . . ."

Of course, the Appellate Division did not reach this determination, notwithstanding that the Trial Court's charge formed an important portion of Respondent's appeal to the Appellate Division.[6]

Dealing directly with that which appears to form the core of Petitioner's application to this Court, Petitioner asserts (P.Br. 5):

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[6] As set forth in Respondent's brief before the New York Court of Appeals (R.Br. NYCA 54-58), various charges of the Trial Court were such as to, in any event, disable the Court of Appeals from reinstating the jury's verdict, even if it otherwise had the ability to do so. Cf. dissenting opinion of Judge Fuchsberg, P.Br. App. 5b.

"In particular, despite clear record evidence to the contrary, the Appellate Division purported to find 'no evidence of a breakdown in the ship's steering mechanism in the early morning of December 16th' shortly before the Master was lost. Pet. App. 2a. Similarly, the appellate court claimed to find in the record 'no evidence that the crew members should have known that the Master was washed overboard . . .' (Pet. App. 4a), although there was in fact testimony that certainly so indicated. And the court dismissed as 'sheer speculation' any 'finding that a defective storm rail on the poop deck contributed to the Master's loss . . .' because there was 'no proof . . . that Master Blume went overboard in an area where the railing was defective'; the court ventured from certain testimony in the record the alternative theory that 'the Master could have been knocked unconscious against a railing or bulkhead or washed directly into the sea.' Pet. App. 3a. In short, the Appellate Division overturned the jury's verdict on the basis of its own reading of the record." (footnote reference omitted)

The record is clear, that the immediate consequence of the rudder failure while the vessel was broaching to, was not massive damage to the vessel. This *severe* damage as per Petitioner's own contention, was caused by the overloaded condition of the vessel. Further, it is to be noted and as Petitioner correctly points out (P.Br. 13, fn. 19), in a seaworthiness case the burden is one of "a direct causal relationship between the defect complained of and the ultimate loss". Moreover, *viewing the rudder loss most favorably to the Petitioner,* can it be said ". . . were it not for

this condition, the loss would not have been sustained.", as the Trial Court did charge[7] (Tr. A1595).

With respect to the remaining contentions of the Petitioner, as they relate to the Appellate Division's finding that any defective storm rail could not have contributed to the Master's loss, these are both resolved solely by a review of the evidence of record, the evidence on which the Appellate Division made its findings.

In this regard, it should be noted that the Appellate Division indicated (P.Br. App. 3a):

> "In fact, *plaintiff's expert testified* that the Master could have been knocked unconscious against a railing or bulkhead or washed directly into the sea. Therefore, any finding that a defective storm railing on the poop deck contributed to the Master's loss is *sheer speculation.*" (emphasis added)

As noted above, Petitioner demonstrated by a preponderance of the evidence, that Master Blume would have been knocked unconscious into the seas present on the day in question. Notwithstanding this clear and uncontradicted proof, he sets before this Court the proposition (P.Br. 5):

> ". . . the court (Appellate Division) ventured from certain testimony in the record *the alternative theory* that 'the Master could have been knocked unconscious against the railing or bulkhead or washed directly into the sea.'" (emphasis added)

It is respectfully submitted that there was no *alternative theory.*

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[7] The Trial Justice instructed the jury at one point that the loss of rudder occurred on December 13th and not on December 16th (Tr. A1428).

The Court is also respectfully directed to the following evidence of record, *all* of which was adduced and made part of the record now before this Court by *Petitioner* (Tr. A256-62). Accordingly, it was the Petitioner's proof as adduced from his expert that the water that allegedly struck Master Blume at the time of his inspection was:

> *". . . several hundred pounds of water moving with a velocity of an express train and if it is confined to a close area, like a funnel, then the effect of the force is even greater."*

And on query by the Court of this witness:

> THE COURT: "Does that water have sufficient impact to cause a lifeboat to become *unstowed?*
> THE WITNESS: Yes.
> THE COURT: *Does it have sufficient impact to bend steel?*
> THE WITNESS: Yes, indeed, sir.
> THE COURT: *Steel?*
> THE WITNESS: Yes, sir."

Petitioner's further proof indicated that:

> Q "What would be the effect, assuming a man were standing in that passageway, *what would be the effect then on him?"*
>
> • • •
>
> A *"The effect would be that the man would be unable to resist the force of the water."*

Finally, from Petitioner's witness, Seaman Kuberski, Petitioner further proved the effects of this very water (Tr. A169):

> Q "What happens when green water hits somebody?
> A *It rips you apart."*

All of the above, adduced only by Petitioner, makes it difficult, in the presence of this unrebutted proof, to understand what role the presence or absence of a guardrail could have had with respect to this case.[8] The Appellate Division so found

In this regard it is to be noted, that with respect to a water tight door, concerning which it had been Petitioner's contention was inappropriately sealed, with the Trial Court's taking this issue from the jury on the basis of the force of the green water that Petitioner's expert described, Petitioner agreed and termed it "judiciously removed" (P.Br. NYCA 28, fn.)

Reasons for Declining the Granting of the Relief Requested by Petitioner

Respondent has never contended that any but the Federal Law governs the instant case. *See* R.Br. NYCA generally, and more particularly, pp. 7, 53-54, 78.

It was the Petitioner, before the New York Court of Appeals (P.Br. NYCA 5), who sought to have applied other than the Federal Law, inasmuch as to reinstate the judgment (P.Br. App. 2d), as reversed by the Appellate Division, would be to permit the addition of prejudgment interest in the amount of $499,255.62, which is in conformity with the law of the State of New York (The Es-

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[8] Ironically, it would appear that the absence of the railing would have made it more likely that Master Blume, assuming that he was able to resist the force of the water, would not have been knocked unconscious.

tates, Powers & Trusts Law, *supra* 2), but in clear derogation of the controlling law, the Federal Law.[9]

While this Respondent has never disputed the applicability of the controlling cases of this Court as they relate

[9] It is clear that in matters of prejudgment interest Federal Maritime Law applies, and preempts. Moore-McCormack Lines, Inc. v. Amirault, 202 F. 2d 893, (1st Cir. 1953); Robinson v. Pocahontas, Inc., 477 F. 2d 1048, (1st Cir. 1973); Newburgh Land and Dock Company v. The Texas Company, 227 F. 2d 732, (2d Cir. 1955). With respect to a jury-tried Jones Act case, it is clear that prejudgment interest may not be awarded. Casey v. American Export Lines, Inc., 173 F. 2d 324, rev'd on other grounds 176 F. 2d 337, (2d. Cir.), cert. denied, 338 U.S. 885 (1949); Cortes v. Baltimore Insular Line, Inc., 66 F. 2d 526, (2d. Cir. 1933); Doucet v. Wheless Drilling Company, *et al.*, 467 F. 2d 336, (5th Cir. 1972); Sanford Brothers Boats, Inc. v. Vidrine, 412 F. 2d 958, (5th Cir. 1969); Parisi v. Lady in Blue Inc., 433 F. Supp. 681, (D.C. Mass. 1977); *see* also Moore-McCormack Lines, Inc. v. Richardson, 295 F. 2d 583, 594, (2d Cir. 1961), cert. denied, 368 U.S. 989 (1962). With respect to Moragne, *supra* 3, it has been said that the award of prejudgment interest rests within the "sound discretion of the trial judge" (however, the instant record makes it clear that the Trial Court exercised no discretion in this case, but rather acted in an ministerial fashion which is appropriate pursuant to New York's Estates, Powers & Trusts Law, *supra* 2), *In re* Sincere Navigation Corporation, 329 F. Supp. 652, 660, (E.D. La. 1971), modified and remanded on other grounds 529 F. 2d 744, (5th Cir. 1976). With respect to the Death on The High Seas Act, *supra* 2, to be considered in conjunction with the jury's failure to at all discount to present value Master Blume's past and future wages (Tr. A1620; Pet.App. 1e, ans. 5), *see* Moore-McCormack Lines, Inc., v. Richardson *supra;* and more recently Sincere Navigation Corporation, *supra;* Dennis v. Central Gulf S.S. Corp., 323 F. Supp. 943, (E.D. La. 1971), aff'd 453 F. 2d 137, (5th Cir.), cert. denied, 409 U.S. 948 (1972). Further, and as much at it is clear that the Petitioner neither requested that the jury be instructed as to an award of prejudgment interest, nor was the jury so instructed, *see* Robinson v. Pocahontas, Inc., *supra;* Newburgh Land and Dock Company v. The Texas Company, *supra;* and Barton v. Zapata Offshore Co., 397 F. Supp. 778, (E.D. La. 1975).

to the quantum of proof necessary in an action instituted pursuant to the Jones Act (R.Br. NYCA 53-54, 58-59), nevertheless, this Court has said, in reversing a state court adjudication of an affirmance of a jury verdict in favor of a decedent's representative that:

> "When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of the respondent that the . . . caused or contributed to cause the death is without any substantial support. *The record leaves the matter in the realm of speculation and conjecture. That is not enough.*" (emphasis added) *Chicago, Milwaukee & St. Paul Railway Company* v. *Coogan, Special Administratrix, etc.*, 271 U.S. 472, 478 (1925).

Moreover, the instant case is not one such as Petitioner suggests, wherein Appellate Courts have substituted their judgment for that of the jury. The theory of the Petitioner before the Trial Court, as set forth, *supra* 3-4, was present from his opening, up to and including the completion of the entire case, when the issue was ultimately withdrawn, for all purposes, from the jury. In toto, the issues concerning the overloading and course of the vessel, and the responsibility therefore, constitute a majority of the voluminous record now before this Court.[10]

[10] Petitioner's theory that the overloading of the vessel proximately caused the Master's loss was again demonstrated by his closing hypothetical question to his expert witness (Tr. A421-37). Petitioner asked in part:

> Q "Do you have an opinion, assuming the previous state of facts, as to whether the vessel *violated its loadline certificate* in being overloaded, in breaking ground at 16,950 tons,

(Footnote continued on following page)

Petitioner's approach throughout the presentation of this case, was consistent with his opening which reflected in part (Tr. A63-73):

> "Finally, during the night of the 15th of December — — remember the captain was lost the 16th. During the night of the 15th of December the *vessel took a severe amount of damage on deck.*"
>
> * * *
>
> "So the vessel is going deeper and damage is sustained, damage on the deck. The night of the 15th — — and it is our position that this damage *would not have been severe* had the vessel not overloaded in Portland in anticipation of proceeding across the ocean to Yokohama."
>
> * * *
>
> "And because the vessel was *overloaded, the overloading caused the progressive loss of buoyancy, the progressive loss of buoyancy caused more damage, and the damage was the reason the captain was out there,* and that is why he was washed over the side inspecting *damage that should not have been there.*"

(Footnote continued from preceding page)

in entering the winter zone at 16,826, and on the 16th of December being 16,482 tons, where the A.B.S. shows - - strike that - - where the capacity booklet shows it at 16,628 and - - 16,628, summer mark, low line, (as in original) and 16,000 winter mark loadline."

* * *

A "I stated that it was *overloaded* on those occasions.

Q And on those occasions of being *overloaded,* can you tell us with a reasonable degree of certainty whether it violated the Safety Regulations upon which loadline certificates are based?"

* * *

A "Yes, it is my opinion."

As the foregoing makes clear, Petitioner had sought to establish that the overloaded condition of this vessel proximately resulted in the Master's death and yet, with the determination of both the Trial Court, and that of the Appellate Division, that this responsibility rested solely in the decedent, he was in complete agreement. Petitioner's approach, as set forth above, was again completely consistent with his statement to the jury with respect to the overloading of the vessel as it related to the Master's demise (Tr. A62-63):

> "You must maintain those marks because when you lose — — when you go down deep in the water you lose buoyancy. *It is a chain reaction.*"

As a result of Petitioner's approach in attempting to fix the responsibility in someone else for the loading, and the course of the S.S. WASHINGTON TRADER, the applicability of *Walker* v. *Lykes Bros. Steamship Co., Inc.,* 193 F. 2d 772, (2d Cir. 1952) was urged. Before the New York Court of Appeals Petitioner was in *full agreement* with the application by the Trial Court of this doctrine[11] (P.Br. NYCA 27). More importantly, although it is Petitioner's position that the judgment of the trier of the facts was supplanted by that of Appellate Courts, this, the most controverted issue in the entire record, with multiple factual determinations, was taken from the jury. With that decision, Petitioner wholeheartedly agreed (Tr. A1486).

Petitioner has recited to this Court its own prior mandate, and suggests that the instant case is one which falls within the ambit of *Rogers* v. *Missouri Pacific R. Co.,* 352 U.S. 500 (1956), as exemplifying a matter wherein (P.Br.

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[11] Before the Trial Court, Petitioner's position was opposite (Tr. A1467): "I'm pointing out to the Court that *the Walker doctrine has been abolished.*"

7) ". . . state courts persistently deprive litigants of their right to a jury determination".

However, one of the primary bases of this Respondent's appeal to the Appellate Division from the judgment below, rested precisely on the Trial Court's withdrawal from the realm of the fact finder, the issues of loading and course setting. Accordingly, this Respondent, in appealing the Trial Court's determination, asked the Appellate Division (R.Br. NYCA 3):

> "May a trial court withdraw from the jury's consideration the acts and activities of the Master which gave rise to his death . . ."

This position was reiterated to the New York Court of Appeals (R.Br. NYCA 60-61), as suggestive of the nullity of the jury's verdict, and the injustice its reinstatement would have provided.

The Evidence of Record

With respect to Petitioner's assertion that there exist in the record before this Court three examples of record evidence, ". . . each of which *independently provides* an adequate basis for the jury's verdict . . ." (emphasis as in original, P.Br. 11), notwithstanding as set forth, *supra* 5, that there could be no adequate basis, each of Petitioner's contentions shall be considered.

The question simply stated is whether the damage resulted from the vessel's broaching to, or was the severe damage as Petitioner contended in the Court below, *supra* 12, a result of the *overloaded condition* of the vessel *at the time of the broaching to.* While Petitioner sets forth that (P.Br. 13) ". . . the jury could have found that Master

Blume's death was, at least in part, the result of the . . . steering mechanism.", Petitioner further notes that (P.Br. 13, fn. 19):

> "The trial court . . . properly instructed the jury on the need for 'a direct causal relationship between the defect complained of and the ultimate loss.'"

Accordingly, Petitioner is in agreement that the burden in a seaman's case, as referrable to a seaworthiness claim, is entirely different from the quantum of proof necessary in a Jones Act case. This distinction is in accord with both Benedict[12] and Norris[13].

Moreover, while Petitioner indicates that the jury was specifically instructed that the loss of the rudder control constituted an unseaworthy condition, his further statement that (P.Br. 12, fn. 18) ". . . neither of the New York appellate courts expressed any disagreement with this instruction.", certainly does not demonstrate the approval by either of those Courts of this instruction, since neither had occasion to ever reach this issue.[14]

With respect to the second of Petitioner's contentions, as it relates to the allegedly defective guardrail (P.Br. 13), it is to be noted, in the first instance, that the Appellate Division did not deal with the presence or absence of guardrails. It dealt *solely* with the absence of prox-

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[12] I. Hall, A. Sann, S. Bellman, BENEDICT ON ADMIRALTY, 7th. Ed., Vol. IB, § 28, at 3-162 (1976).

[13] M.J. Norris, THE LAW OF SEAMEN, 3rd. Ed., 2d Vol. § 624, at 196-97; § 690 at 374-75 (1970).

[14] The appropriateness of this instruction was contested on the authority, *inter alia,* of Savard v. Marine Contracting, Inc., 471 F. 2d 536, (2d Cir. 1972), cert. denied, 412 U.S. 943 (1973); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); cf. R.Br. NYCA 54-58.

imate cause. Moreover, the Appellate Division's finding was somewhat broader than as contained in Petitioner's brief (P.Br. 13). The Appellate Division stated (P.Br. App. 3a):

> "As for the specification of unseaworthiness based on a broken or bent storm railing on the poop deck, *there simply is no proof that any defective railing was a proximate cause of the Master's loss.* There is no proof even that Master Blume went overboard in an area where the railing was defective. *In fact, plaintiff's expert testified that the Master could have been knocked unconscious against a railing or bulkhead or washed directly into the sea.* Therefore, any finding that a defective storm railing on the poop deck contributed to the Master's loss is *sheer speculation.*" (emphasis added)

There was controverted evidence as to whether any railing on the port side of the poop deck was damaged. However, the Appellate Division's finding was two-fold. Indeed, not only did the Appellate Division state that (P.Br. App. 3a): "There is no proof even that Master Blume went overboard in an area where the railing was defective.", but that in connection with the testimony of Petitioner's expert, the presence or absence of a guardrail was not causative in that ". . . the Master could have been knocked unconscious against a railing or bulkhead or washed directly into the sea." A contrary finding could only be sheer speculation.

In a case wherein the Court had occasion to reverse a trial court's dismissal of a seaman's case in a matter involving lifelines, Judge Hand reflected:

> "Nobody could, in the nature of things, be sure that the intestate would have seized the rope,

> or, if he had not, that it would have stopped his body. But we are not dealing with a criminal case, nor are we justified, where certainty is impossible, in insisting upon it. We cannot say that there was no likelihood that a rope three feet above the deck made by the timber would not have saved the seaman. *In this connection we note that the ship did not take aboard green water, but that the bluff of the bow broke the force of the sea shipped, which, when it reached the deck load, was made up of white water, and was not big enough to lift up a man's body.*" (emphasis added) *Zinnel* v. *U.S. Shipping Board Emergency Fleet Corporation,* 10 F. 2d 47, 49, (2d Cir. 1925).

To be noted in the above portion of *Zinnel,* is a fact pattern precisely the *opposite* of that of the instant case. The S.S. WASHINGTON TRADER did *take aboard green water,* and that which allegedly struck Master Blume was a funnel of incredibly forceful water capable of bending steel, *supra* 8.

Indeed, while Judge Hand instructed that the white water present in *Zinnel* ". . . was not big enough to lift up a man's body.", Seaman Kuberski[15] informs us in the case at bar that the green water which struck Master Blume ". . . rips you apart" (*supra* 8).

Moreover, in a case involving the loss of a crewman, wherein a specification of unseaworthiness was alleged, based upon dislocated stantions of a guardrail, which alleged break in protection only *twenty steps* from the seaman's station, allowed him to go over the side, the Court indicated:

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[15] This testimony was, of course, uncontradicted. Boat Dagny v. Todd, 224 F. 2d 208, 209, (1st Cir. 1955).

> "Guided by the prescriptions of *Chicago, Milwaukee & St. Paul Railway Company* vs. *Coogan,* 271 U.S. 472 (1926), our judgment is that when the facts, and the conclusions which a jury might fairly draw from them, are *taken most strongly against the shipowner, the plaintiff's contention that the slack in the chain accounted for or contributed to Swords' death is 'without any substantial support. The record leaves the matter in the realm of speculation and conjecture'* (at 478). *This is not enough to justify submission of the issue of causative unseaworthiness to the jury.*" (emphasis added) *Swords* v. *American Sealanes, Inc.,* 443 F. 2d 1324, 1325, (4th Cir.), *cert. denied,* 404 U.S. 948 (1971).

Also to be noted is that Petitioner did not adduce any proof in the Trial Court with respect to whether Master Blume could even swim. It further appears he wore no life jacket, although one was available (Tr. A920).

Finally, Petitioner cites the Appellate Division as baldly asserting that (P.Br. 14):

> "(t)here is no evidence that the crew members should have known that the Master was washed overboard".

However, what immediately precedes this indication by the Appellate Division is worthy of note (P.Br. App. 4a):

> "As for the claims of negligence we find neither fault nor proximate cause *even if fault exists*". (emphasis added)

Accordingly, Petitioner's contention with respect to the alleged failure of the crewmen to respond to the Master's

peril, and the alleged failure of the chief officer to act, are both resolved by the record before this Court solely in terms of proximate cause.

As a threshold determination, it is to be noted that notwithstanding Petitioner's assertion before the New York Court of Appeals (P.Br. NYCA 44), the record is *devoid of any evidence that would even suggest that Master Blume died as a result drowning.*

While[16] *Abbott* v. *United States Lines,* 512 F. 2d 118, (4th Cir. 1975), citing *Gardner* v. *National Bulk Carriers, Inc.,* 310 F. 2d 284, (4th Cir. 1962), *cert. denied,* 374 U.S. 913 (1963), spoke to the issue of rescue, the Court concluded at 119:

> "We hold that if there is a *reasonable possibility* of rescue, a ship[17] is under a duty to search and attempt a rescue . . ." (emphasis added)

Not only did the Petitioner fail to demonstrate any indices in the Trial Court which would support a finding that Master Blume could have survived even momentarily, but rather the proof demonstrated that in all probability he could not have survived.[18]

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[16] Cf. dissenting opinion of Judge Fuchsberg (Pet. App. 4b-5b).

[17] The Abbott Court, at 121, was clear in its admonition that this "controlling principle" runs to the knowledge of the vessel's *officers.*

[18] It should be noted that Petitioner advanced before the New York Court of Appeals his contention that the search for Master Blume was less than thorough (P.Br. NYCA 60). It is to be noted that while this was Petitioner's position before that Court, it is submitted, that neither was it suggested to the jury by the Trial Court's charge that the activities of Mate Perkins at the site of the Master's alleged loss were in any way deficient, nor was it advanced as a claim of negligence in the discussions had during the precharge session (Tr. A1528-50).

With respect to Petitioner's contention that Seaman Kuberski's testimony perhaps "compels" the inference of non-officer crew negligence (P.Br. 14-15), perhaps from Seaman Kuberski's other testimony,[19] the inference is also compelled that there was never any possibility of rescue, let alone a reasonable one. Seaman Kuberski testifying about the seas on the day in question indicated (Tr. A178): *"In this sea there is no sense going back because nobody could live in this water five minutes."*

As to Petitioner's claim (P.Br. 14, fn. 22), that Mate Perkins found it "impossible" to string lifelines as to those railings he found "damaged[20] or missing", it is respectfully submitted that this is somewhat of an understatement of Mate Perkins' testimony (Tr. A911-12). Moreover, Petitioner's citation to the record does not reflect Mate Perkins saying only that it was "impossible" but rather, to have done so would be *"Murder if you did"*. Accordingly, the ability of the crew of the S.S. WASHINGTON TRADER to have done this in the past, can have no relevance with respect to their ability to have done so at this time, given Mate Perkins' testimony as to the weather,

[19] It is also to be noted that notwithstanding Petitioner's assertion that ". . . Kuberski reported to Chief Mate Perkins what he had seen . . ." (P.Br. 15), Mate Perkins testified that he had no recollection of any aspect of this conversation (Tr. A760).

[20] It is to be noted that Mate Perkins' testimony was that no damage was found to the railing of the port side of the poop deck (Tr. A725). Moreover, none was known to him to have occurred at any time during the voyage (Tr. A914).

the seas,[21] and the offense it would have constituted to have directed the crew accordingly.

Notwithstanding this, Petitioner states (P.Br. 14, fn. 22): "From such evidence, the jury was entitled to infer negligence on the part of the crew . . ." Given the foregoing recitation of the evidence of record, it is at best difficult to understand from what the jury would have drawn this inference.

The Decisions Below Represent the Appropriate Disposition of the Instant Matter

What is set forth above, particularly the affirmative acts of the decedent himself, make it clear that the disposition of the Appellate Courts below was appropriate.

Finally, while petitioner notes (P.Br. 18):

> ". . . and thus the decision below . . . could seriously impact large numbers of cases in which *seamen* seek to exercise their federally guaranteed right . . ." (emphasis added)

It is submitted that the matter before this Court involves the *individual* charged with the bringing of this vessel, the S.S. WASHINGTON TRADER, over the open seas safely to its destination. It seeks recovery on behalf of the very *steward* of that vessel.

[21] In this connection, the Court's attention is respectfully directed to the ship log for the time at issue (Exhibit 7, Tr. A1727), which reflects, that with respect to 3:15 a.m. on December 16th, the nearest Beaufort Scale readings and sea indications demonstrating the intensity of the wind and seas were for 12:00 a.m.: 8 on the Beaufort Scale with very rough seas; and 4:00 a.m.: reflecting 7-8 and very rough seas.

CONCLUSION

It is respectfully requested, based upon all the foregoing, that this Court decline to grant the application of the Petitioner.

Respectfully submitted,

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APPENDIX A

Judgment Entered on Appeal to Appellate Division

(Filed—May 3, 1978)

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

INDEX No. 19530/67

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the Estate of CARL P. BLUME, Deceased,

Plaintiff-Respondent,

—against—

AMERICAN TRADING AND PRODUCTION CORPORATION,

Defendant-Appellant.

The above entitled action having duly come on for trial before Honorable Judge Edward J. Greenfield, and a jury, at a Trial Term, Part 22 of the Supreme Court, held in and for the County of New York, at the Courthouse 60 Centre Street, in the City of New York, on April 25, 26, 27, 28, 29 and May 2, 3, 4, 5, 6 and 9, 1977, and the plaintiff having appeared by Kenneth Heller, Esq., and the de-

Appendix A

fendant having appeared by D'Amato, Costello & Shea, Joseph M. Costello, of counsel, and the issues having been duly tried; and the jury having rendered a special and general verdict in favor of the plaintiff against the defendant American Trading and Production Corp., on May 9, 1977, in the amount of $808,536.00, and the jury having found 10% contributory negligence on the part of the decedent, and the Court having fixed the sum of 90% of $808,536.00 at $727,682.40, with interest to run from December 16, 1966, and the Court having denied the motions by defendant to set the verdict aside, and the costs and disbursements of the plaintiff having been taxed in the sum of $582.10, and it having been adjudged

That the plaintiff, Thomas I. Fitzgerald, Public Administrator of the County of New York, as Administrator of the Estate of Carl P. Blume, Deceased have judgment against the defendant, American Trading and Production Corp., on the issues tried and it having been further adjudged

That the plaintiff, Thomas I. Fitzgerald, Public Administrator of the County of New York, as Administrator of the Estate of Carl P. Blume, Deceased, of 31 Chambers St., N.Y.C. recover of the defendant American Trading and Production Corp., residing at 555 Fifth Avenue, New York, New York the sum of $727,682.20, together with the sum of $499,255.62, representing interest thereon from the 16th day of December 1966, together with the sum of $532.10/100 costs and disbursements as taxed, making a total sum of $1,277,420.12/100, and the substance of the foregoing having been filed with the Clerk of this Court, by the plaintiff as his judgment on May 17, 1977, and American Trading and Production Corp. having appeared therefrom

Appendix A

And the appeal having come on before the Appellate Division of the First Department during the February term of 1978,

And the Appellate Division First Department by its Order dated April 20, 1978 reversing on the law, without costs and disbursements, the aforementioned judgment entered May 17, 1978 and having vacated same and having ordered that the complaint of the plaintiff be dismissed, is hereby

Adjudged that Judgment in this matter be entered and the same is hereby entered in favor of the defendant, American Trading and Production Corp. dismissing the complaint and it is hereby further

Adjudged that the Judgment filed May 17, 1977, and so appealed from be and the same is hereby reversed and is hereby vacated.

Dated: New York, New York
May 2, 1978

Norman Goodman
Clerk

APPENDIX B

Judgment Entered on Appeal to Court of Appeals

(Filed—January 11, 1980)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

INDEX No. 19530/67

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the Estate of CARL P. BLUME, Deceased,

Plaintiff-Appellant,

—against—

AMERICAN TRADING AND PRODUCTION CORP.,

Defendant-Respondent.

The above entitled action having come on to be heard before the New York Court of Appeals, on October 9, 1979, and that Court, after due deliberation, having ordered and adjudged, by an order dated November 27, 1979 that the Order of the Appellate Division, First Judicial Department dated April 20, 1978 be affirmed with costs, now, it is hereby

Appendix B

ADJUDGED, that the order of the Appellate Division dated April 20, 1978 and the Judgment entered on May 3, 1978, is hereby affirmed, and it is further

ADJUDGED, that the defendant-respondent, American Trading and Production Corp. recover of the plaintiff, Thomas I. Fitzgerald, Public Administrator of the Estate of Carl P. Blume, deceased, the sum of $2,748.97, inasmuch as costs and disbursements have been taxed, and that the defendant-respondent have execution therefore.

Judgment entered and signed this 11th day of January, 1980.

NORMAN GOODMAN
Clerk

APPENDIX C

The Death on the High Seas Act, 46 U.S.C. §761 provides:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person or corporation which would have been liable if death had not ensued.

The Loadline Law, former 46 U.S.C. §85c provided:

It shall be unlawful for any vessel subject to sections 85-85g of this title and to the regulations established thereunder to be so loaded as to submerge, in sea water, the load line or lines marked pursuant to said sectors and to the regulations established thereunder applicable to her voyage; or so as to submerge under like conditions the point where such load line or lines ought to be marked pursuant to the provisions of said sections and of the regulations established thereunder; or so as in any manner to violate the said regulations.

Supreme Court, U.S.
FILED
MAY 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-1299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR,
Petitioner,

v.

AMERICAN TRADING AND PRODUCTION CORP.,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals of New York

REPLY OF PETITIONER

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May 1980

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IN THE

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Respondent.

Petition for Writ of Certiorari to the Court of Appeals of New York

---

REPLY OF PETITIONER

Petitioner submits this reply in response to the opposition to certiorari filed by respondent. Respondent's opposition offers no persuasive reason for denying certiorari in this case. On the contrary, respondent's own arguments confirm that the New York appellate courts, in direct contravention of this Court's settled precedents, have invaded the province of the jury in a case of this type, thus warranting summary reversal by this Court.

1. Respondent argues principally that certiorari should be denied because at trial petitioner claimed that the S.S. Washington Trader was unseaworthy due to overloading for the zone of the Pacific in which it was sailing when Master Blume was lost. Opp. at 3-4, 11-14. This argument is patently untenable.

Unseaworthiness due to overloading and course setting was, to be sure, one of the theories that petitioner pursued as a part of his affirmative case at trial. But, as the record makes clear, petitioner also introduced evidence of unseaworthiness and negligence due to a number of other factors, including loss of rudder control (Tr. 833-34, 839-40, 1376-77), a broken guardrailing in the area where the Master had last been seen inspecting the ship for damage in heavy seas (Tr. 126a-126b, 425-26), and failure of the ship's crew to initiate rescue efforts in a timely fashion (Tr. 122-35, 142). All these latter theories were submitted to the jury on instructions that the dissenting judge below termed "impeccable" and that neither the Court of Appeals nor the Appellate Division questioned in any respect. Tr. 1565-1572, 1582-86. The claim of unseaworthiness based on the ship's loading and course setting, however, was not even sent to the jury in connection with petitioner's affirmative case.[1]

Under these circumstances, it is simply irrelevant for present purposes that petitioner attempted—unsuccessfully—to establish liability on, among other things, a theory concerning the ship's loading and course. Even the Appellate Division, in overturning the jury's verdict, did not suggest—as respondent apparently believes—that petitioner is barred from recovering on theories of rudder failure, broken guardrailing and so forth because the trial court dismissed an alternative and independent theory advanced by petitioner. On the contrary, it is quite clear that the Appellate Division's decision rests on the view that once the issues of loading and course had been removed from the jury's consideration as a part of petitioner's case, there then was not "sufficient" evidence to sustain the jury's verdict on any of petitioner's other, separate theories. Pet. App. 2a.

[1] In the trial judge's view, the Master was solely responsible for the loading and the course setting, and consequently these matters could not properly form a basis of recovery for the Master's death. Tr. 1527-28, 1552-54.

It is on this latter point that the New York appellate courts seriously erred, thus requiring the grant of certiorari and reversal of the decision below. It is no answer here that petitioner pursued before the trial court a theory concerning the ship's loading and course that was never even sent to the jury as a part of petitioner's case.[2]

2. Respondent ultimately does not dispute—as it cannot—that under this Court's decisions the New York appellate courts were required to sustain the verdict in the trial court if there was some evidence, "however small," to support it under any theories of liability sent to the jury. See, *e.g.*, *Rogers* v. *Missouri P.R.R.*, 352 U.S. 500, 508 (1957); *Schulz* v. *Pennsylvania R.R.*, 350 U.S. 523 (1956). Petitioner has already cited (Pet. at 11-17) three examples of record evidence, each of which is independently sufficient to demonstrate that there clearly is not the "*complete absence of probative facts*" required before the jury's verdict in this case may be set aside. *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946) (emphasis added).

Unable to refute the presence of such evidence in the record, respondent has resorted instead to citing contrary evidence from the record and suggesting alternative inferences that could be drawn from the evidence. Opp. at 14-21. By so doing, respondent has simply confirmed that this case was properly sent to the jury, that there was evidence in the record to support the jury's verdict, and that the New York appellate courts improperly usurped the jury's function by overturning the verdict for "insufficiency of proof" and dismissing petitioner's case. Pet. App. 4a.

[2] The trial court did send the Master's own conduct, including specifically the issue of course setting, to the jury as a part of respondent's case on contributory negligence (Tr. 1587-88, 1616); and the jury's verdict included a finding of ten percent contributory negligence on the part of the Master (Pet. App. 1e). The trial court's treatment of the Master's fault in connection with his own death clearly was proper. See, *e.g.*, *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 408-09 (1953) ("[A]dmiralty has developed and now follows its own fairer and more flexible rule which allows . . . consideration . . . in mitigation of damages as justice requires."). See also Pet. App. 5b (dissenting opinion of Judge Fuchsberg.)

First, with regard to the issue of rudder loss, respondent does not deny that there was in fact evidence of steerage loss on December 16, 1966 (Pet. at 12-13) and that the Appellate Division was simply wrong in asserting otherwise. Nor does respondent deny that the loss of steerage constituted a serious, unseaworthy condition for which it was responsible. Rather, respondent now offers a new theory to escape liability. It suggests that the damage necessitating the Master's fatal inspection trip was the result not of the rudder loss and the ship's "broaching to" in the heavy seas but rather of the ship's overloaded condition, for which the Master was responsible. Opp. at 14.

The short answer to this argument is that there was ample evidence from which the jury could have inferred that the rudder loss contributed directly to the ship's damage and thereby to the Master's loss. For example, the Chief Mate testified that when the ship lost steerage early on December 16, "the ship went broached to in the sea,"[3] the crew "had no control over the vessel," and the ship then suffered damage. Tr. 833-34; A1779-81. And the Chief also testified that early on the morning of December 16 he was called to the ship's bridge and told by the Master that the ship had "lost her steerage and . . . had sustained some damage on deck . . . ." Tr. 839-40. See also Tr. 1382, 1567.

The trial court fully and properly instructed the jury that it had to find a "direct causal relationship" between the unseaworthy condition of the rudder and the loss of the Master in order to decide for petitioner.[4] Tr. 1566-67. It was the jury's

[3] That is, the ship "laid in the trough of the sea" broadside, subject to the pounding of the waves. Tr. 833.

[4] The trial court explained to the jury that the requirement of such a causal relation did *not* mean that the rudder loss must be the "sole reason" for the loss, but rather that it "must be one of the reasons which proximately led to that loss, together with the other things which may have contributed." Tr. 1567. Respondent now implies (Opp. at 15) some disagreement with the trial court's instruction on causation, but it raised no objection to this instruction before the trial court. Tr. 1614-16.

function to make this determination based on the evidence in the record. See, *e.g.*, *Tennant* v. *Peoria & P.U. Ry.*, 321 U.S. 29, 35 (1944). Respondent's present attempt to reargue the evidence affords no basis whatsoever for sustaining the appellate courts' unwarranted interference with the jury's decision.[5]

Second, respondent acknowledges that the record contains evidence that the guardrailing was broken in the area where the Master had last been seen inspecting the ship for damage. Opp. at 16. But, like the Appellate Division, respondent contends that it is mere speculation that the broken railing contributed to the Master's loss. Opp. at 16.

In so arguing, respondent simply ignores Seaman Kuberski's acknowledgement at trial that there was nothing other than the broken railing "to prevent anything or anybody from going over the side" in the area where heavy seas had struck and the Master had last been seen.[6] Tr. 127, 121-27. Thus, the evidence placed the Master in a dangerous situation in which the guardrailing was essential to his safety. From such evidence, the jury clearly was entitled to find that the broken condition of the railing had played a part in the Master's death.

[5] As Judge Fuchsberg noted in the court below, "it was for the jury alone to determine, as it did, what role [the loading and course-setting of the ship] played on the issue of proximate cause or as a contributing factor in diminution of a recovery for negligence." Pet. App. 5b.

[6] Contrary to what respondent seems to believe, the jury certainly was not prevented from relying on such testimony in finding for petitioner simply because an expert witness speculated that the Master might first have been "knocked unconscious against a railing or bulkhead or washed directly into the sea." Opp. at 16. "The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant* v. *Peoria & P.U. Ry.*, *supra*, 321 U.S. at 35. And the jury's "conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored." *Id.*

See, *e.g.*, *Schulz* v. *Pennsylvania R.R., supra,* 350 U.S. at 523; *Lavender* v. *Kurn, supra,* 327 U.S. at 652-53.[7]

Indeed, as the dissenting Judge below noted, at trial "defendant's counsel agreed that whether the guardrails were unseaworthy and, if so, proximately causative of the death, was a question of fact for the jury." Pet. App. 4b; see Tr. 1480-82. On this basis alone, the jury's verdict should have been sustained, and the appellate courts below patently erred in concluding otherwise.[8]

Third, respondent does not deny that the Appellate Division erred in asserting "[t]here is no evidence that the crew members should have known that the Master was washed overboard. . . ." (Pet. App. 4a). There clearly was. See Pet. at 14-15.

Respondent now argues instead that the crew's negligence in failing to initiate rescue efforts until hours after the Master disappeared is somehow excusable because the Master supposedly could not have survived for long after being swept overboard. Respondent relies solely on a remark by Seaman

[7] In light of the evidence specifically placing the Master in dangerous circumstances in the area where the guardrail was broken, this case is readily distinguishable from *Chicago, M. & St.P. Ry.* v. *Coogan,* 271 U.S. 472 (1926), and *Swords* v. *American Sealanes, Inc.,* 443 F.2d 1324, 1325-26 (4th Cir.), *cert. denied,* 404 U.S. 948 (1971), upon which respondent relies (Opp. at 11 & 18). In both *Coogan* and *Swords,* there was *no* evidence from which the juries could have inferred that the dangerous conditions identified in each case played any part in the accidents for which recovery was sought. The same is not true here.

[8] Respondent now makes much of evidence concerning the force of the water that struck the area where the Master was last seen. (Opp. at 17.) However, as the decision in *Zinnel* v. *United States Shipping Board Emergency Fleet Corp.,* 10 F.2d 47, 49 (2d Cir. 1925), upon which respondent itself relies (Opp. at 16-17), makes clear, such evidence does not alter the essential fact that it is "a question about which reasonable men might at least differ whether the intestate would not have been saved, had [the railing] been there."

Kuberski suggesting that the Master could have survived only a few minutes in the water. Opp. at 20. It is hard to understand how this testimony serves to absolve respondent of liability for its crew's negligence in failing to search immediately for the Master at the time he was washed overboard.[9] But, in any event, there was evidence before the jury that the Master could in fact have survived for a very considerable period of time in the sea conditions that existed when he disappeared. Tr. 483-487.[10]

As a result, despite respondent's present argument, there clearly was sufficient evidence from which the jury could have determined that the negligent failure of respondent's crew to initiate timely rescue efforts contributed to the Master's death.[11]

[9] Certainly, there was evidence indicating that the crew should have realized immediately that the Master had been swept overboard and should have responded to his plight at once. See Tr. 126-26a & 134; Pet. at 14-16. This same point disposes of respondent's suggestion that there was no evidence at trial as to whether Master Blume could swim. Opp. at 18.

[10] Among other things, Captain Ash, an expert witness for the plaintiff, testified at trial that the temperature of the water in which the Master disappeared was such that "a man could survive for a number of hours;" that so long as the Master "had the buoyancy, he would just ride up and down with the waves;" "that there have been cases where men have survived under even worse conditions;" and that he did "not agree" with Kuberski's suggestion that a man could not have survived "for five minutes in those waters." Tr. 486.

[11] Likewise, there was sufficient evidence from which the jury could have found that the Chief Mate negligently failed to repair the broken railing prior to the Master's loss. See Pet. at 14 n.22. Respondent argues in effect that the Mate acted reasonably in not fixing the railing or stringing lifelines (Opp. at 20), but that was a question for the jury to decide, see, *e.g.*, *Schultz* v. *Pennsylvania R.R., supra,* 350 U.S. at 526.

Consequently, there was ample basis for the jury's findings of negligence in this case.[12]

3. In sum, respondent has brought forth nothing to dispel the conclusion that the New York appellate courts erred in overturning the jury's verdict and dismissing petitioner's case for lack of sufficient evidence. There clearly was "an evidentiary basis for the jury's verdict," and there can be no question but that under this Court's prior decisions the verdict should therefore have been sustained. See, *e.g.*, *Lavender* v. *Kurn*, *supra*, 327 U.S. at 653; *Tennant* v. *Peoria & P.U. Ry.*, *supra*. What is more, respondent does not dispute that the decision below, if allowed to stand uncorrected, could ultimately have a severe adverse impact on large numbers of other seamen's rights to a jury-adjudication of their negligence and unseaworthiness claims. Pet. at 18. Given the considerable significance of the decision and the fact that it is patently wrong under this Court's prior precedents, the Court should—as it has often done in analogous circumstances in the past[13]—grant certiorari, summarily reverse and direct that the jury's verdict be reinstated.[14]

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[12] Indeed, where, as here, the injured seaman makes a prima facie showing that he was injured and that the shipowner's crew was negligent in some respect, the only way in which the shipowner can avoid a jury verdict of liability is "to establish by indisputable and uncontroverted evidence both the cause of the accident and its own freedom from negligence." G. Gilmore & C. Black, *The Law of Admiralty* 378 (2d ed. 1975). Respondent does not even claim to have met this burden here.

[13] See generally *Harris* v. *Pennsylvania R.R.*, 361 U.S. 15, 19-21 (1959) (appendix to concurring opinion of Douglas, J., citing and categorizing cases).

[14] Respondent suggests in a lengthy footnote (Opp. at 10 n.9) that the trial judge erred in adding prejudgment interest to the jury's award to petitioner. Pet. App. at 1d-2d. However, that issue is not now before this Court (cf. Pet. App. 4a), and the *trial judge's* award of prejudgment interest obviously is no bar to reinstatement of the *jury's verdict*.

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted, the decision below summarily reversed, and the case remanded with instructions to reinstate the jury's verdict. Alternatively, certiorari should be granted and the case set for plenary review.

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May 1980